ORIGINAL

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

RECEIVED

AUG 1 6 1996

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In re

Amendment of the Commission's Regulatory Policies to Allow Non-U.S.-Licensed Space Stations to Provide Domestic and International Satellite Service in the United States	)	IB Docket No. 96-111
Amendment of Section 25.131 of the Commission's Rules and Regulations to Eliminate the Licensing Requirement for Certain International Receive-Only Earth Stations	)	CC Docket No. 93-23 RM-7931
COMMUNICATIONS SATELLITE CORPORATION Request for Waiver of Section 25.131(j)(1) of the Commission's Rules as it Applies to Services Provided via the Intelsat K Satellite	)	File No. ISP-92-007

DOCKET FILE COPY ORIGINAL

REPLY COMMENTS OF THE NEWS CORPORATION LIMITED

The News Corporation Limited ("News Corp.") hereby replies to certain comments filed in response to the Notice of Proposed Rulemaking (the "Notice") in the above-captioned matters.

News Corp.'s comments will address generally the applicability of the Commission's proposed "ECO-Sat" test to the DBS/DTH service. More particularly, News Corp. will focus on two related issues: the extent to which foreign content-based restrictions can constitute entry barriers relevant to the Commission's ECO-

No. of Copies rec'd 0+4
List ABCDE

Sat analysis, and the unique and inextricable link in the DBS/DTH service between content -- *i.e.*, programming -- and the facilities over which that programming is distributed.

INTRODUCTION

News Corp., through various subsidiaries, is a major international producer of theatrical motion pictures and television entertainment and sports programming. News Corp. also currently provides, or soon will provide, multichannel DTH or DBS services to subscribers in the United Kingdom, Japan, China and southeast Asia, and countries throughout Latin America. In addition, through a joint venture with MCI Telecommunications Corporation ("MCI"), News Corp. will provide multichannel DBS service to U.S. households commencing in 1997.

From its perspective as both a content and satellite services provider in numerous countries around the world, News Corp. is uniquely situated to comment on the effect of content-based restrictions on the ability of U.S. DBS/DTH services to compete in foreign markets, and their relevance, in turn, to the Commission's ECO-Sat analysis. News Corp.'s experience also substantiates the inextricable link between content and facilities in the DTH/DBS service. As will be shown below, an ECO-Sat test based solely on facilities-based competition will be susceptible to exploitation by DBS/DTH operators utilizing satellites licensed by foreign administrations with discriminatory content regimes.

CANADIAN CONTENT POLICIES ILLUSTRATE THE ADVERSE EFFECTS OF CONTENT RESTRICTIONS ON COMPETITIVE OPPORTUNITIES FOR U.S. DTH/DBS SERVICES IN FOREIGN MARKETS.

Precisely because the true value of DTH/DBS service resides in program content, News Corp. submits that an ECO-Sat test limited to consideration of foreign regulation of satellite *facilities* will not permit a full and accurate assessment of the competitive opportunities for U.S. DTH/DBS services in foreign markets. Indeed, even proponents of a limited facilities-based ECO-Sat test concede that the competitive effects of foreign "programming and content policies" are relevant when "*such policies allow domestic operators to have an unfair advantage over U.S. operators*." Comments of Western Tele-Communications, Inc. ("WTCI") at 13 (emphasis added). But WTCI's argument proves too much. Clearly, whether foreign content policies would afford foreign services an opportunity to distort competition can be determined only by application of the ECO-Sat test to specific factual circumstances.

We do not submit that all national content policies, such as the minimal and indirect U.S. restrictions cited in WTCI's Comments (at 13), constitute barriers to DTH/DBS competition. For example, it is inconceivable that the U.S. ban on the broadcast of certain tobacco product advertising or lottery information could afford U.S. DTH/DBS services a meaningful competitive advantage over their non-U.S. competitors. But it is entirely possible -- and, as will be shown below, it is a fact -- that a foreign administration's content policies can have a direct effect on competition by U.S. DTH/DBS services. Restrictions that establish quantitative domestic content quotas, for example, favor domestic services by denying U.S. operators economies of scope and scale in program production and acquisition. See, e.g., Comments of MCI at 16-19; Comments of Home Box Office ("HBO") at 16 n.11 ("barriers to the importation of foreign program content may effectively preclude the use of U.S. satellites for video distribution").

The obvious and well-documented protectionism by the United States' largest trading partner, Canada (see July 1, 1996 letter to Chairman Hundt from "Members of the Executive Branch" (attached hereto)), provides a particularly apt illustration of the pernicious effects of domestic content restrictions on competition among DTH/DBS services. Even should Canada be determined by the Commission to be an open market with respect to the provision of other telecommunications services, its market for DTH/DBS services is markedly different. In fact, Canadian law and policy effectively preclude competition in Canada by U.S. firms in either the satellite services or video program services market segments.

First, Canadian policy expressly provides that Canadian "satellite facilities" must be used "to carry (i.e. receive and/or distribute to Canadians) all Canadian programming services." In addition, Canada's 1991 Broadcasting Act requires video distributors to "make maximum use, and in no case less than predominant use, of Canadian creative and other resources in the creation and presentation of programming." Meanwhile, rules specific to the cable, DTH/DBS and MMDS sectors state that these services "should give priority to carriage of

Canadian programming services and, in particular, to the carriage of local Canadian stations."

The Canadian Radio-Television and Telecommunications Commission ("CRTC") protects Canadian specialty cable and DTH/DBS channels through its "non-duplication" and "linkage" rules. With respect to non-duplication, the CRTC flatly prohibits market entry of a U.S. specialty channel deemed to be "either totally or partially competitive" with a Canadian program service. Even where there is no duplication, distribution of U.S. signals is "discretionary," with U.S.-originated satellite program services to be selected from an approved list of "Eligible Satellite Services." Excluding broadcast television stations, only 11 U.S. program services currently are permitted to be distributed in Canada. In a notorious recent case, the CRTC deleted a U.S. cable program network, the Country Music Channel, from the list of eligible services because a new competing Canadian channel had been developed. The case was settled only following an investigation conducted by the office of the United States Trade Representative ("USTR") to determine if retaliatory measures should be taken. Other services reported to have been denied carriage or removed from the eligibility lists include USA Network, MTV, Nickelodeon, Gospel Music Television and others.

U.S. program services deemed eligible for distribution in Canada are further subject to "linkage" requirements, pursuant to which Canadian DTH/DBS services must maintain specified ratios of domestic Canadian to non-Canadian programming offered as part of service packages or tiers. For example, each

Canadian specialty program service in a discretionary tier may be linked with no more than one of the permitted U.S. services or signals.

APPLYING THE ECO-SAT TEST: EVALUATION OF COMPETITIVE OPPORTUNITIES FOR DTH/DBS SERVICES NECESSARILY ENTAILS CONSIDERATION OF BOTH CONTENT AND FACILITIES ISSUES.

The Commission has recognized that the underlying premise of the ECO-Sat test -- to ensure "fair, vigorous competition" -- "is not satisfied by a government policy that allows a competitor to enter its satellite service market, *yet erects obstacles that prevent such competition from being effective as a practical matter*." Notice at ¶ 40 (emphasis added). Access to a foreign market for U.S. satellite facilities would not alleviate concerns about competitive distortion if the users of those facilities remain subject to exclusionary foreign content restrictions. Thus, a threshold question for the Commission is whether *content* restrictions such as those described above are relevant to the Commission's regulation of satellite *facilities*. See Notice at ¶41. Clearly, they are relevant, and for very important reasons.

The U.S. government has taken the position that foreign regulation of content is relevant to U.S. licensing of facilities.

The July 1 Executive Branch letter stating its concern with Canadian content restrictions was submitted explicitly in connection with applications for licenses to communicate with Canadian satellite facilities. Representatives of four U.S. Government cabinet officials have taken the extraordinary step of writing to

\\\DC - 61599/6 - 0324588.01

the Commission to express their view that Canadian programming restrictions *are* relevant to the use by U.S. DTH/DBS operators of Canadian facilities.

Content and facilities are inextricably linked in the market.

As a practical matter, content and facilities are inextricably linked: the demand for facilities is derived from the demand for programming. The ultimate consumer of DTH/DBS services, for example, does not care by what facilities a signal reaches her household. The consumer buys programming, and facilities have no value except to make programming available. For this reason, a country's programming restrictions weigh heavily on its market for facilities.

The U.S. programming market is the world's most lucrative, in considerable part because there are so few content restrictions. The right to operate facilities that serve the U.S. market is valuable, in turn, because of the value of programming demand. Consequently, a country can not be said to offer effective competitive opportunities to U.S. providers if it grants only the right to serve a market that is shrunken and distorted by tight restrictions on programming. It matters little whether U.S. facilities providers are theoretically permitted to serve a foreign market if programming in that market is so restricted that few facilities are demanded. A narrow examination of facilities access accordingly does not afford the Commission the information it needs accurately to assess competitive opportunities.

The Commission's proposed focus for ECO-Sat assessments properly includes both content and facilities.

We strongly support the Commission's stated goal of "promoting fair competition in each submarket for satellite services." Notice at ¶ 36. However, many submarkets will have both facilities and content components that are intrinsically related to each other and are essential elements of a particular submarket. To suggest that in an application for a facilities license the Commission should disregard competitive opportunities, or the lack thereof, in that same submarket's programming is unrealistic, if not naive. It is also a strained and inappropriate reading of the Commission's proposed approach. In "Identifying the Appropriate Service Categories for Comparison" (Id. at ¶¶ 33-36), the Commission has offered a broad "rule of thumb" for distinguishing apples from oranges. But, as several commenters have noted, trying to distinguish between facilities and content is like trying to separate an apple and its core. See Comments of HBO at ii, 12-17 (ECO-Sat analysis should include consideration of type of satellite, type of transmission service, and "ultimate end use of the service"); Comments of Columbia Communications Corporation at 13 (ECO-Sat test should evaluate competitive opportunities for "actual types of services that the applicant proposes to offer -- e.g., video, voice or data"); Comments of L/Q Licensee, Inc. and Loral Space & Communications Ltd. at 25-26 (application of ECO-Sat should take into account policy concerns relevant to specific services, including "whether the service is content-based or not"). News Corp. agrees that, in order to realize the

Commission's policy objective of ensuring effective competition across a range of services, "foreign satellites should not be permitted to engage in any service subcategory that would be closed to U.S. entities in the foreign operator's relevant home and route markets." Comments of Orion Network Systems, Inc. at 9.

News Corp. submits that, in the current international environment, the Commission must look at government restrictions on all aspects of a service in order to apply the ECO-Sat test properly. To the extent that other administrations begin to follow the policy direction of the United States -- deregulating telecommunications -- the Commission in the future may be in a position to narrow the focus of the ECO-Sat test further. So long as content restrictions continue to distort the demand for facilities, however, the interplay of content and facilities issues must be taken into account.

CONCLUSION

News Corp. urges the Commission to include both the effects of foreign content restrictions, and the interrelatedness of content and facilities restrictions, in its effective competitive opportunities analysis regarding foreign satellite services.

Respectfully submitted,

THE NEWS CORPORATION LIMITED

By Peggy Binzel
Peggy Binzel
Senior Vice President

The News Corporation Limited
5151 Wisconsin Avenue, N.W.
Washington, D.C. 20016
202/895-3269

August 16, 1996